Supreme Court, U.S.
FILED
MAR 26 2001
CLERK

MAR 26 2001

No. 00-596

In the
Supreme Court of the United States

LORILLARD TOBACCO CO., et al.,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN MEDICAL ASSOCIATION, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICAN CANCER SOCIETY, CENTER FOR SCIENCE IN THE PUBLIC INTEREST, AND MASSACHUSETTS MEDICAL SOCIETY, IN SUPPORT OF RESPONDENT

DONALD W. GARNER *
PROFESSOR OF LAW
LESAR LAW BUILDING
SOUTHERN ILLINOIS BLDG.
CARBONDALE, IL 62901
(618) 453-8718

RICHARD J. WHITNEY
SPEIR & WHITNEY
3200 FISHBACK RD.
CARBONDALE, IL 62901
(618) 549-5159

Counsel for Amici Curiae

* Counsel of Record (Additional counsel on inside front cover)

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

BEST AVAILABLE COPY

GEORGE A. HACKER
DIRECTOR, ALCOHOL POLICIES PROJECT
CENTER FOR SCIENCE IN THE PUBLIC INTEREST
1875 CONNECTICUT AVE., N.W., STE. 300
WASHINGTON, D.C. 20009
(202) 332-9110, EXT. 343

BEST AVAILABLE COPY

TABLE OF CONTENTS

Table of Authorities iv

Statement of Interest of Amici Curiae 1

Summary of Argument 1

Argument 2

I. THE MASSACHUSETTS REGULATIONS CONTROL ONLY THE LOCATION OF TOBACCO ADVERTISING, NOT THE ADVERTISING CONTENT, AND ARE THEREFORE NOT PREEMPTED BY FEDERAL LAW. 2

A. Federalist principles demand an inquiry into legislative history and the use of other aids to construction in order to understand and limit the scope of an express preemption provision. 5

B. The legislative history of the 1965 and 1969 Acts, and a fair reading of the statute as a whole, support the conclusion that § 5(b)'s purpose was to protect the tobacco industry from having to alter the *content* of its brand advertising. 7

C. The case law on § 5(b) strongly supports the conclusion that Congress intended to preempt only those requirements or prohibitions that affect the content of tobacco brand advertising. 13

II. THE REGULATIONS DO NOT VIOLATE THE FIRST AMENDMENT, SINCE THEY ARE CAREFULLY DRAWN TO PROTECT CHILDREN FROM EXTRAORDINARILY HARMFUL MESSAGES IMPOSED ON THEM BY INTRUSIVE AND UNAVOIDABLE MEANS OF ADVERTISING. 18

A. This Court's well-settled rule giving government considerable latitude to protect children from indecent speech should be extended to government measures aimed at protecting children from speech that can lead to their death. 19

B. The Regulations pass First Amendment scrutiny for the additional reason that they target speech disseminated by intrusive media, which impose harmful messages on children

in a manner that cannot be avoided. 28

Conclusion 30

Appendix

Appendix A
Description of Individual Amici Curiae 1a

TABLE OF AUTHORITIES

Cases **Page(s)**

Anheuser-Busch, Inc. v. Schmoke,
101 F.3d 325 (4th Cir. 1996) 23-25

Austin v. Tennessee,
179 U.S. 343 (1900) 27

Bethel Sch. Dist. v. Fraser,
478 U.S. 675 (1986) 20

Breard v. Alexandria,
341 U.S. 622 (1951) 29

California Division of Labor Standards Enforcement v. Dillingham Construction, Inc.,
519 U.S. 316 (1997) 6, 11

Capital Broadcasting Co. v. Acting Attorney Gen.,
405 U.S. 1000 (1972) 17, 20

Capital Broacasting. Co. v. Mitchell,
333 F. Supp. 582 (D.D.C. 1971) 17, 20

Carey v. Population Services International,
431 U.S. 678 (1977) 26, 27

Cipollone v. Liggett Group,
505 U.S. 504 (1992). ..... 5, *passim*

Consolidated Cigar Corp. v. Reilly,
218 F.3d 30, 41 (1st Cir. 2000) 13

Denver Area Educ. Telecommunications Consortium, Inc. v. FCC,
116 S. Ct. 2374 (1996) 20, 29, 30

FCC v. Pacifica Found.,
438 U.S. 726 (1978) 20, 29

Fed'n of Adver. Indust. Representatives v. Chicago,
189 F.3d 633 (7th Cir. 1999)("*FAIR*") 13

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 26

Ginsberg v. State of New York,
390 U.S. 629 (1968) 19, 20, 24

Greater New York Metropolitan Food Council, Inc. v. Giuliani,
195 F. 3d 100 (2d Cir. 1999) 4, 12, 13

Kovacs v. Cooper,
336 U.S. 77 (1949) 28

Lehman v. City of Shaker Heights,
418 U.S. 298 (1974) 29

Lindsey v. Tacoma-Pierce County Health Dept.,
195 F. 3d 1065 (9th Cir. 1999) 13

Lorillard Tobacco Co. v. Reilly,
76 F. Supp. 2d 124 (D. Mass. 1999) 4

Medtronic v. Lohr,
518 U.S. 470 (1996) 5, 6, 11

Midwest Booksellers Ass'n v. City of Minneapolis,
780 F.2d 1389 (8th Cir. 1985) 24

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,
514 U.S. 645 (1995). 6

Packer Corp. v. Utah,
285 U.S. 105 (1932) ..... 3, passim

Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore,
63 F. 3d 1318 (4th Cir. 1995)
(*Penn Advertising I*) 13

Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore,
101 F.3d 332 (4th Cir. 1996)
(*Penn Advertising II*) 23

Prince v. Massachusetts,
321 U.S. 158 (1944) 19, 20

R.A.V. v. City of St. Paul,
507 U.S. 377 (1992) 18

Reno v. American Civil Liberties Union,
521 U.S. 844 (1997) 20, 23

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 7

Rockwood v. City of Burlington,
21 F. Supp. 2d 411 (D. Vt. 1998) 13-15

Rowan v. United States Post Office Dept.,
397 U.S. 728 (1970) 29

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803, 120 S. Ct. 1878 (2000) 21-23

Virginia State Bd. of Pharm. v.
Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) 18, 23

Statutes and Regulations

Page(s)

940 C.M.R. §§ 21.00-27.07 ..... 3, *passim*

Public Health Cigarette Smoking Act of 1969 § 5(b),
Pub. L. No. 91-222, 84 Stat. 87 (1970),
15 U.S.C. § 1334(b). ..... 3, *passim*

Federal Cigarette Labeling and Advertising Act,
Pub. L. No. 89-92, 79 Stat. 282 (1965)
(codified as amended at 15 U.S.C.
§§ 1331-1341) ..... 3, *passim*

Laws Utah 1929 ch. 92 (codified at Utah Code Ann.
§ 76-10-102(1) (1995)) 10

Regulations Restricting the Sale and Distribution
of Cigarettes and Smokeless Tobacco
to Protect Children and Adolescents,
61 Fed Reg. 44, 396 (1996) 24

Secondary Authorities

Page(s)

Donald W. Garner & Richard J. Whitney, *Protecting Children from Joe Camel and his Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 Emory L.J. 479 (1997) 2, 15

CA Judge Refuses to Enjoin Implementation of MSA, Andrews' Tobacco Industry Litig. Rep., Nov. 12, 1999 4

Gordon Fairclough, *California Sues Reynolds Over Magazine Ads*, Wall St. J. March 20, 2001 4

Committee on Preventing Nicotine Addiction in Children and Youths, Institute of Medicine, *Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths* 3 (Barbara S. Lynch & Richard J. Bonnie eds., 1994). 5

U.S. Dep't of Health, Educ. & Welfare, U.S. Surgeon Gen.'s Advisory Comm., *Smoking and Health* (1964) 7

115 Cong. Rec. 16291 (1969) 10

H.R. Rep. No. 91-289 (1969) 10

H.R. Rep. No. 91-897 (1970) 10

S. Rep. No. 91-566, (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652 ..... 11, 14

The Tobacco Institute, *Code of Cigarette Sampling Practices* (1983) 14

Federal Trade Commission, *Federal Trade Commission Cigarette Report for 1999* (2001) 14, 26

Donald W. Garner, *Tobacco Sampling, Public Policy and the Law*, 11 J. Health Politics, Pol'y & Law, 423 (1986) 14-15

U.S. Dep't of Health & Human Servs., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994) 24

Tobacco Use Among High School Students-- United States, 1997, Morbidity and Mortality Wkly. Rep. (U.S. Dep't of Health & Human Servs.), Apr. 3, 1998 25

News and Views From the Franklin County Prevention Institute, Reuters, Nov. 14, 1996 25

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The organizations submitting this brief share a commitment to promoting the health and well-being of the people of the United States. They therefore share a common interest in supporting the Massachusetts Attorney General's efforts to protect the public, and especially children, from solicitations to use tobacco products. A brief description of each individual Amici is provided in the Appendix to this brief.

SUMMARY OF ARGUMENT

The analysis of the various issues offered in this amicus brief rests upon a common foundation: The restriction of intrusive forms of tobacco advertising serves values so profoundly important that this Court should accord them great respect when considering the reach of the First Amendment and federal preemption. When young children are constantly and involuntarily bombarded with seductive messages appearing on neighborhood storefronts that promote a lifelong addiction, not only is their health endangered, but their right to be free from having adult choices foisted upon them is not so subtly infringed. When parental admonitions against smoking are trivialized by in-store cigarette displays at eye level next to the candy, the right of parents to guide their children toward a life of health and vitality is undermined. And when cigarettes at

---

[1] *Rule 37 Compliance:* This brief is being filed with the Court by the written consent of all parties, in compliance with Rule 37. No counsel for any party authored this brief in whole or in part. A monetary contribution to the preparation and submission of this brief was made through a grant to Prof. Donald Garner from the Substance Abuse Policy Research Program of the Robert Wood Johnson Foundation, Route 1 and College Road East, P.O. Box 2316, Princeton, N.J. 08543-2316.

local convenience stores are strategically placed within reach of elementary school kids, state laws prohibiting tobacco distribution to children are publicly mocked.[2]

The Petitioners in this case seek to gain an absolute right to impose tobacco advertising upon young children by way of large storefront billboards, ubiquitous in-store displays and handy cigarette packages in the aisles of convenience stores. The Attorney General of Massachusetts has determined that these are unfair and/or deceptive methods of advertising, in that they encourage tobacco use by children under legal age. Petitioners claim that this determination is meaningless. This case will finally answer whether our Constitution and federal law strip states and local communities of all their authority to protect their children from being lured into a lethal addiction by unavoidable tobacco advertising.

ARGUMENT

I. THE MASSACHUSETTS REGULATIONS CONTROL ONLY THE LOCATION OF TOBACCO ADVERTISING, NOT THE ADVERTISING CONTENT, AND ARE THEREFORE NOT PREEMPTED BY FEDERAL LAW.

The central question raised by Petitioners' preemption challenge is whether Congress in 1969 intended to grant the cigarette companies the unqualified right to involuntarily inflict their advertising upon children by all means, fair or foul.

---

[2] *See generally* Donald W. Garner & Richard J. Whitney, *Protecting Children from Joe Camel and his Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 Emory L.J. 479 (1997).

Petitioners maintain that the billboard and in-store regulations promulgated by the Attorney General of the Commonwealth of Massachusetts, 940 C.M.R. §§ 21.00-27.07 ("Regulations") are preempted by § 5(b) of the Public Health Cigarette Smoking Act of 1969 ("1969 Act"), Pub. L. No. 91-222, 84 Stat. 87 (1970), which provides: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b) (amending the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) ("1965 Act")).

Petitioners contend that there is no good reason to consider what Congress might have really wanted to accomplish by § 5(b) because the dictionary definition of the words used are broad enough to encompass any health-based state or local regulation of any cigarette advertising or promotional practice. (Pet'rs' Br. at 15-16.) If the Petitioners' view prevails, the cigarette industry will be free – in the words of the only Supreme Court opinion to rule on cigarette billboards – to "thrust" their advertising message upon young people "by all the arts and devices that skill can produce." *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932).

While Petitioners frequently refer to their acceptance of the advertising restraints contained in the "Master Settlement Agreement" (MSA), (Pet'rs' Br. at 3, 9, 12-13, 43, 45-46), that fact should be accorded no weight in this Court's analysis of either the preemption or First Amendment questions at stake. The states cannot rely on the MSA as a substitute for direct regulation. The MSA neither controls all the business entities that advertise tobacco products, nor does it sufficiently restrict the methods of advertising that pose the greatest threat to children.

The MSA imposes no limits at all on retailers, boutique cigarette manufacturers, distributors who re-import cheap domestic cigarettes, and other "gray market" tobacco companies. *See CA Judge Refuses to Enjoin Implementation of MSA,* Andrews' Tobacco Industry Litig. Rep., Nov. 12, 1999, at 13. If the 1969 Act preempts all health-based state and local regulation of cigarette promotion, these companies and any future start-up manufacturers of tobacco will be free to increase their share of the critical juvenile market by the same means pioneered by the Petitioners. They could, for instance, begin openly passing out free samples of cigarettes to young teenagers at rock concerts and handing out cigarette posters using cool cartoon characters to first-graders. *Cf. Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F. 3d 100, 105 (2d Cir. 1999)(describing absurd results of interpreting § 5(b) in hyper-literal fashion).

Petitioners, meanwhile, would remain free to erect store-front signs across from elementary schools and wallpaper the interior of convenience stores near playgrounds with point-of-purchase displays – while pushing the boundaries of the MSA. In the case at bar, Petitioners initially sought to strike down, on preemption grounds, a provision in the Regulations that barred the free distribution of samples, except mail sampling with age verification. (Pet. Cert. at 5 n.4); *Lorillard Tobacco Co. v. Reilly*, 76 F. Supp. 2d 124, 128 (D. Mass. 1999). Equally disquieting, one of the Petitioners has been sued by various states for allegedly targeting teenagers, in violation of the MSA. Gordon Fairclough, *California Sues Reynolds Over Magazine Ads*, Wall St. J. March 20, 2001, at A3.

Amici submit that Congress never intended to completely destroy the power of states and municipalities to protect children from an addiction that promises to kill more of them than cocaine, heroin, fire, suicide, homicide, AIDS and

auto accidents combined. *See* Committee on Preventing Nicotine Addiction in Children and Youths, Institute of Medicine, *Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths* 3 (Barbara S. Lynch & Richard J. Bonnie eds., 1994). On the contrary, when Congress passed the 1969 Act, it intended to preempt only those health-based state or municipal "requirement[s] or prohibition[s]" that affect the *content* of tobacco advertising. It never intended to preempt zoning or zoning-like laws that merely restrict the *locations* in which tobacco advertising is permitted to appear. The text of the statute as a whole, its legislative history, case law and common sense strongly point to that conclusion.

A. Federalist principles demand an inquiry into legislative history and the use of other aids to construction in order to understand and limit the scope of an express preemption provision.

When the exercise of historic state police powers is challenged on preemption grounds, a reviewing court must look, "not only in the text," but must form a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996). Thus, this Court is duty-bound to scrutinize the legislative history and use other extrinsic aids to avoid suppressing local self-rule beyond what Congress intended. This principle is embedded in the approach taken in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) – the only Supreme Court decision that has yet interpreted § 5(b).

Though the Court was divided on the ultimate question in *Cipollone*, every opinion in the case ventured beyond the literal text of § 5(b) in interpreting that section and used

extrinsic aids, including legislative history, to attempt to ascertain Congress's true intentions. *Cipollone*, 505 U.S. at 513-515, 519-521, 529-30 (plurality opinion); *id.* at 534-35, 539-542 (Blackmun, J., concurring in part and dissenting in part); *id.* at 553 (Scalia, J., concurring in part and dissenting in part).

The Court's intensive inquiry into Congressional intent was prompted by its guardianship of our federalism – in particular, the fundamental principle that the states' traditional police powers are not to be superseded unless Congress has clearly manifested its intention to do so. *Id.* at 516, 523 (plurality opinion); *id.* at 533 (Blackmun, J., concurring in part and dissenting in part). Accordingly, a majority of the Court agreed that § 5(b) must be given a narrow construction. *Id.* at 523 (plurality opinion); *id.* at 533-34 (Blackmun, J., concurring in part and dissenting in part).

This Court's post-*Cipollone* decisions have erased any lingering doubts that it is obligated to consider legislative history and other indicia of Congressional intent when a broadly worded express preemption provision is at issue. *See, e.g., Medtronic,* 518 U.S. at 484-86; *California Division of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316, 331-32 (1997); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

The disputed and ambiguous phrases in § 5(b) – "requirement or prohibition," "based on smoking and health" and "with respect to the advertising or promotion of any cigarettes" – are potentially sweeping. *Cf. Blue Cross*, 541 U.S. at 655 (noting that, taken literally, the term "relate to" in ERISA's preemption provision could broadly preempt state laws). The dictionary-driven "plain meaning" approach that

Petitioners urge this Court to adopt creates an unacceptable risk that more state and local sovereignty will be destroyed than Congress intended. This Court should be guided instead by its well-settled rule that "[t]he purpose of Congress "must be 'the ultimate touchstone' of pre-emption analysis." *Cipollone*, 505 U.S. at 516.

Most importantly, Congress is presumed not to have intended to destroy the right of state and local governments to regulate in areas the "states have traditionally occupied." *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 330 (1947). State exercises of their historic powers "are not to be superseded unless that is the clear and manifest purpose of Congress." *Id.* In applying that rule, the *Cipollone* Court found that, "in the 1969 Act, Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." *Cipollone*, 505 U.S. at 516. So too, in this case, the legislative history offers no sign that Congress wished to insulate cigarette manufacturers from longstanding state or local zoning laws.

B. The legislative history of the 1965 and 1969 Acts, and a fair reading of the statute as a whole, support the conclusion that § 5(b)'s purpose was to protect the tobacco industry from having to alter the *content* of its brand advertising.

In 1964, Surgeon General Luther Terry issued his landmark Report tying cigarette smoking to lung cancer. U.S. Dep't of Health, Educ. & Welfare, U.S. Surgeon Gen.'s Advisory Comm., *Smoking and Health* (1964). Strong public reaction prompted the Federal Trade Commission and several states to consider requiring warnings on cigarette packages and in advertising. *Cipollone*, 505 U.S. at 513.

Congress stepped into this public health maelstrom by adopting the 1965 Act, which required cigarette packages to carry a warning that cigarette smoking was hazardous to health. In § 5(a) of the 1965 Act, Congress prohibited other government bodies from requiring the placement of any other statement on cigarette packs. Similarly, in § 5(b), Congress provided that: "No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this act."

These preemption provisions were set to expire on July 1, 1969. 1965 Act, § 10. As that date approached, the states again began entertaining proposals to toughen restrictions on cigarette advertising, *Cipollone*, 505 U.S. at 514-515, and the tobacco companies again faced the prospect that each of the fifty states (as well as cities and counties) might impose packaging and advertising requirements on the industry.

It was in that context that Congress adopted the 1969 Act, which banned cigarette ads from TV and radio, allowed the FTC to impose warning-label requirements on print advertisements after July 1, 1971, and stiffened the health warning requirements for cigarette packaging. It also amended § 5(b), introducing the present language: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes, the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b).

Obviously, the current version of § 5(b) is broader than the original. However, read in the light of this history, the salient change substituting "requirement or prohibition" for "statement" did not indicate that Congress intended to preempt anything other than state or local measures that affected

advertising content.[3] Rather, it indicates that Congress intended to preempt not only the affirmative act of requiring "statements" but also any health-based prohibitions of particular messages, themes or images.

Congress's express statement of purpose in the 1965 and 1969 Acts also supports the conclusion that Congress was not concerned with state or local rules that regulate only the location of cigarette advertising. When Congress amended § 5(b), it let stand the same declaration of legislative intent found in the 1965 Act. 15 U.S.C. § 1331. It still sought to keep the public "adequately informed about any adverse health effects of cigarette smoking" and to protect "commerce and the national economy" from being "*impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health*." *Id.* (emphasis added).

In 1969, no less than in 1965, Congress's sole concern, with respect to preemption, was to prevent state and local content regulation and thereby protect the tobacco and advertising industries from the burden of having to produce different ads to conform to each state or local regulation.

---

[3] Congress may certainly have intended § 5(b) to prevent states from enacting bans on cigarette advertising in all or most media, as the California State Senate had started to do in a bill passed in 1969. *Cipollone*, 505 U.S. at 515 n. 11. Such extreme measures obviously affect advertising content by eradicating it altogether. However, the Regulations at issue here are narrowly focused. They do not touch magazine and newspaper ads, clothing promotions, direct mail or Internet advertising, and they permit both outdoor and retail establishment advertising in zones that are less frequented by children.

This point was clearly made in a 1969 House debate. Rep. Brock Adams (D-Wash.) introduced an amendment to allow states that prohibited cigarette sales to minors to require all cigarette advertising to include a warning that such sales were illegal. Rep. Lawrence Fountain (D-N.C.) spoke against the amendment, noting that it "would create utter chaos and virtually make impossible . . . the dissemination of nationally published magazines and indeed many locally published newspapers," and that it would force advertisers to create "fifty different advertising formats." 115 Cong. Rec. 16291 (1969). The Adams amendment failed. *Id. See also* H.R. Rep. No. 91-289, at 33 (1969) (minority views of Reps. Jarman, Dingell and Adams). Congress was motivated to modify § 5(b) by the fear of homegrown message regulation, not the fear that tobacco companies would have to follow state or local zoning laws.

After the House bill passed and was sent to the Senate, it was referred to the Senate Commerce Committee, whose members included Senator Frank Moss, a forceful and ardent foe of tobacco. Senator Moss was from Utah, a state which had enacted a ban on *all* in-store tobacco displays and *all* outdoor tobacco advertising forty years earlier. Laws Utah 1929 ch. 92. Utah's protection of the right of its citizens to be free from having tobacco messages imposed upon them was not some quaint old law that was unknown or unenforced. In fact, it had been upheld by this Court in *Packer Corp. v. Utah*, 285 U.S. 105 (1932) and it was in force in 1969. It remains in force today. Utah Code Ann. § 76-10-102(1) (1995).

If it were manifestly obvious that the bill that became the 1969 Act would preempt Utah's ban, then why didn't Senator Moss speak against it? Why instead did he become the Senate Manager of the bill? H.R. Rep. No. 91-897, at 8 (1970). The reason neither he nor any other member of Congress ever voiced any concern about state or local tobacco billboard

regulation is that the 1969 Act was never meant to strip states like Utah of their sovereign authority to safeguard citizens from having tobacco advertising thrust upon them by intrusive methods. Where a broadly worded preemption statute is at issue, Congress's silence with respect to a well-established state regulatory measure, such as Utah's law, is a reliable indication that Congress did not intend to preempt that measure. *See Medtronic*, 518 U.S. at 491 (plurality opinion); *Dillingham*, 519 U.S. at 331-32. If § 5(b) did not preempt Utah's broad state-wide prohibition against all outdoor and in-store cigarette advertising, it surely does not preempt the Massachusetts Attorney General's much narrower Regulations.

The Senate's report on the bill reiterated that preemption was needed to "avoid the chaos created by a multiplicity of conflicting [state and local] regulations." S. Rep. No. 91-566, (1969), *reprinted in* 1970 U.S.C.C.A.N. at 2652, 2663. Section 5(b) was described as "narrowly phrased" and not intended to touch state power over sales to minors, taxation, indoor smoking, or "similar police [power] regulations. It is limited entirely to State or local requirements or prohibition [sic] *in* the advertising of cigarettes." *Id.* (Emphasis added).

These statements strongly indicate that Congress intended § 5(b) only to prevent state or local interference with the content of cigarette advertisements because only content regulation would create a multiplicity of conflicting rules "in the advertising of cigarettes." Only content regulation by the states threatens to impose on the tobacco companies and their advertisers the substantial burden that prompted Congress to defeat the Adams amendment – the burden of having to produce ads to "conform to fifty different formats."

Unlike content regulations, location restrictions do not create the advertiser's nightmare that Congress sought to

prevent when it adopted § 5(b). They do not require the tobacco companies to design and produce different advertisements to accommodate diverse state or local laws, and do not impose any "confusing" burden on tobacco advertisers, let alone impede "commerce and national economy," 1965 Act, § 1331.

As the Second Circuit explained, in upholding a New York City ordinance barring outdoor and some indoor tobacco advertisements within 1,000 feet of schools and playgrounds:

> Divergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them. Thus, with or without [New York City's ordinance], a cigarette advertiser will still have to ascertain where it can permissibly advertise in light of diverse local zoning ordinances.
>
> *Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F. 3d 100, 109 (2d Cir. 1999).

How can the Petitioners now claim before this Court that it is a "crippling" burden, (Pet'rs' Br. at 13), for them to honor the Commonwealth's storefront sign regulations when the Petitioners under the MSA have already agreed not to use off-premises billboards? Massachusetts simply closed a loophole by preventing the use of storefront signs near schools and playgrounds. Similarly, the only burden created by the in-store regulations is that retail store owners near playgrounds and schools will have to ensure that tobacco ads are kept at least five feet off the floor. In short, the Regulations do not impose any discernible burden on tobacco manufacturers, their advertising agencies or the nation's economy.

C. The case law on § 5(b) strongly supports the conclusion that Congress intended to preempt only those requirements or prohibitions that affect the content of tobacco brand advertising.

The content/location distinction has been embraced by the U.S. Courts of Appeals for the Fourth, Seventh and Second Circuits, as well as the First Circuit in the case at bar. *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 63 F. 3d 1318, 1324 (4th Cir. 1995) (*"Penn Advertising I"*); *Fed'n of Adver. Indust. Representatives v. Chicago*, 189 F.3d 633, 638-639 (7th Cir. 1999)(*"FAIR"*); *Giuliani*, 195 F. 3d at 105-106, 109-110; *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 39-41 (1st Cir. 2000). These jurists concluded that Congress never intended to tread upon the states' traditional authority to restrict advertising by zoning or similar laws.

Against the weight of this authority is the dictionary-as-law analysis of *Lindsey v. Tacoma-Pierce County Health Dept.* 195 F. 3d 1065 (9th Cir. 1999), and its jurisprudential soul-mate, *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998). The *Burlington* case merits particular consideration because it offers a textbook example of what can go wrong when a judge applies a "plain meaning" approach to the preemption language of § 5(b), while refusing to consider what Congress was really trying to accomplish.

The City of Burlington, like Massachusetts, had regulated point-of-purchase and outdoor sign tobacco advertising and had prohibited the distribution of free samples of tobacco products. *Id.* at 414-415. Since § 5(b) applies to "advertising and promotion," and handing out free cigarettes is a well-recognized method of advertising and promoting the use

of cigarettes,[4] the district court judge concluded that Burlington's anti-sampling prohibition "directly affects the advertisement and promotion of cigarettes, and consequently, however well advised the measures are, they are preempted by the FCLAA." *Id.* at 420.

That portion of the *Burlington* opinion sharply illustrates how relying solely on the plain meaning of § 5(b) can lead to results that are destructive of our federalism. Whatever the plain meaning of "advertising and promotion," Congress never meant to take away the power of local communities to prevent the free distribution of cigarettes to sixth graders. The full text and legislative history of § 5(b) makes that point abundantly clear. Senate Report 91-566 states that preemption was not intended to interfere with "police regulations" such as public smoking, taxation or "the sale of cigarettes to minors." 1970 U.S.C.C.A.N. at 2663. The 1969 Act itself defines "sale" to *include* "sampling or any other distribution not for sale." 15 U.S.C. § 1332(6).

If the Senate Report says that state and local regulation of the "sale of cigarettes to minors" is not preempted, and sampling is defined within the 1969 Act to be a sub-species of sale, then sampling regulations should not be preempted. *See generally* Donald W. Garner, *Tobacco Sampling, Public Policy and the Law*, 11 J. Health Politics, Pol'y & Law, 423 (1986). Congress did not take leave of its senses. It never meant to give

---

[4] The Tobacco Institute's Code of Cigarette Sampling Practices states that "[c]igarette sampling is a form of cigarette advertising." The Tobacco Institute, *Code of Cigarette Sampling Practices* (1983). After the MSA took effect in 1998, the industry's expenditures on sampling soared, from $14.4 million in that year, to $33.7 million in 1999 – an increase of 133.5 percent. Federal Trade Commission, *Federal Trade Commission Cigarette Report for 1999* (2001).

the tobacco industry the right to subvert laws in all fifty states that prohibit distribution of cigarettes to minors. *See* Garner & Whitney, *supra*, at 498 n. 103. Yet with its plain meaning blinders on, the *Burlington* court turned § 5(b) into a parody of the true will of Congress.

Just as the troubled phrase in § 5(b), "with respect to the advertising or promotion of any cigarettes," was not intended to repeal juvenile sampling laws, it also was not intended to preempt state or local zoning of outdoor and in-store tobacco ads. By "advertising and promotion," Congress was simply referring to the message, not the media that carry the message or locations where the message may be placed.

While this Court had no need to consider the critical distinction between content and location regulation in *Cipollone*, the opinions and outcome in that case are fully consistent with such a distinction. The question in *Cipollone* was whether § 5(b), under either the 1965 Act or the 1969 Act, preempted state common-law tort and breach-of-warranty claims. *Cipollone*, 505 U.S. at 512. The Court found that some claims were not preempted because they were not "imposed under state law," *id.* at 525 (plurality opinion), or were not "based on smoking and health." *Id.* at 528-29 (plurality opinion). All of the claims that the Court found were preempted under § 5(b), however, were aimed at regulating the *content* of tobacco advertising by challenging, varying or supplementing required statutory health warnings.

With respect to the failure-to-warn claims, for example, the plurality held that, "insofar as claims under either failure-to-warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted." *Id.* at 524. Similarly, it held that a fraudulent misrepresentation

claim was preempted because it was "predicated on a state-law prohibition against statements *in* advertising and promotional materials that tend to minimize the health hazards associated with smoking." *Id.* at 527 (emphasis added).

By refusing to hold the tobacco companies liable for health claims based on the failure of cigarette advertising to carry warnings over and beyond those required by the federal government, *Cipollone* recognized the central preemption goal of Congress: to have but a single federal master to determine what must and must not be said about the dangers of smoking in cigarette ads and on packaging.

In the entire case law on § 5(b) to date, not one opinion has unearthed a single fact in the legislative history that is inconsistent with the compelling distinction between regulation of advertising content and regulation of advertising placement. Rather, the legislative history and prevailing case law alike point to the conclusion that, by "requirement," Congress intended to preempt state rules mandating the inclusion of health content in tobacco advertising, and by "prohibition," Congress intended to preempt state rules mandating the exclusion of health-related content from tobacco advertising. Since the Massachusetts Regulations do not impose either a requirement or a prohibition that relates to tobacco advertising content, they are not preempted.

To find that the Regulations are preempted, this Court would have to conclude that it was the "clear and manifest purpose of Congress" to strip the states of the power to create zones where children may learn and play free of solicitations to smoke. *Cipollone,* 505 U.S. at 518. Yet not one shred of proof of such a purpose has emerged from the litigation arising out of Baltimore, Chicago, Tacoma-Pierce County, Burlington, New York or Massachusetts.

Congress was concerned with protecting "commerce and national economy." 15 U.S.C. § 1331. State laws that only proscribe the location of outdoor and in-store signs do not in any way threaten the national economy – as this Court unanimously decided in *Packer*, 285 U.S. at 111. On the contrary, such laws are in perfect harmony with Congress's overarching purpose. It was, after all, the very same 1969 Act that outlawed cigarette advertising on television and radio, thereby shielding children from being involuntarily exposed to such ads through these similarly intrusive media. 15 U.S.C. § 1335; *see also Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972), aff'g without opinion *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971).

In sum, there is no clear and manifest sign – indeed, there is no sign at all – that Congress wanted to destroy the longstanding right of state and local governments to zone the location of cigarette advertising, any more than it wanted to destroy Utah's 70-year-old ban on outdoor and in-store advertising or nullify state laws banning sampling to minors. On the contrary, a reasoned understanding of the way Congress intended the 1969 Act to apply leads to the common-sense conclusion that Congress did not disturb the right of the people of Massachusetts to decide where cigarette advertising may be displayed in their state.

II. THE REGULATIONS DO NOT VIOLATE THE FIRST AMENDMENT, SINCE THEY ARE CAREFULLY DRAWN TO PROTECT CHILDREN FROM EXTRAORDINARILY HARMFUL MESSAGES IMPOSED ON THEM BY INTRUSIVE AND UNAVOIDABLE MEANS OF ADVERTISING.

The tobacco industry urges this Court to declare that the marketplace of products and the marketplace of ideas should be accorded the same First Amendment protection. Amici urge this Court to declare that children are not to be treated as adults.

"The simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily granted to political speech." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 415 (1992) (Blackmun, J., concurring). This equation of cigarette advertising and child pornography, written by the author of the commercial speech doctrine, *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), animates the First Amendment argument of Amici. Whatever may be the fate of the commercial speech doctrine, children must be accorded a special place in the firmament of the First Amendment.

Recognizing that Respondent and other amici will defend the continued vitality of the commercial speech doctrine, Amici advance an alternative and complementary argument in favor of upholding the Regulations: Irrespective of whether the Court's starting point is "strict scrutiny" or the "intermediate scrutiny" test for commercial speech, the Regulations are entitled to extraordinary judicial deference. Under settled First Amendment principles, the Massachusetts Regulations should be upheld, first, because they are narrowly

aimed at protecting children from messages promoting the use of a substance so uniquely dangerous, lethal and addictive that it cannot be legally sold to them. Second, the Regulations should be upheld because they apply only to the most intrusive types of media – billboards, outdoor signs and in-store ads – that children cannot avoid.

A. This Court's well-settled rule giving government considerable latitude to protect children from indecent speech should be extended to government measures aimed at protecting children from speech that can lead to their death.

This Court has long recognized that governments, in their role as *parens patriae*, may impose reasonable restrictions on First Amendment rights when necessary to protect children. In *Prince v. Massachusetts*, it proclaimed:

> The state's authority over children's activities is broader than over like actions of adults . . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection.
>
> 321 U.S. 158, 168 (1944).

The Court later applied this principle to state-imposed restrictions on freedom of speech. In *Ginsberg v. State of New York*, 390 U.S. 629, 631 (1968), it upheld a law prohibiting the sale to minors of materials depicting female nudity in a manner appealing to prurient interests. Citing *Prince*, the Court held that the state's power to protect children placed limits on the

seller's First Amendment right to peddle such materials. *Id.* at 638-641. Justice Stewart's concurring opinion tellingly observed that a child "is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."*Id.* at 650 (Stewart, J., concurring).

The *Ginsberg* principle has been upheld by the Court on numerous occasions, in the context of protecting children from indecent speech. *See, e.g., FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (Breyer, J., plurality). *See also Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972), aff'g without opinion *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 585-86 (D.D.C. 1971) (upholding provision of 1969 Act outlawing cigarette advertising on television and radio, in part because evidence showed that they were "particularly effective in reaching a large audience of young people").

Two of this Court's more recent opinions have reaffirmed the vitality of this doctrine, making clear that the need to protect impressionable youth from harmful speech merits special consideration in its First Amendment calculus even as they struck down regulations that impermissibly constricted the flow of communication to adults.

In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), this Court voided the Communications Decency Act ("CDA"), which imposed criminal penalties on any individual who knowingly transmitted obscene or indecent messages over the Internet to anyone under 18 years of age. The Court upheld the central tenets of *Ginsberg* and *Pacifica*, carefully explaining a host of distinctions. *Id.* at 864-871. The CDA was both vague, *id.* at 871-874, and overbroad,

threatening to visit criminal sanctions upon adults who transmitted the most marginally indecent speech to an audience that included even one individual under age 18. *Id* at 876-878. The majority characterized it as a "content-based blanket restriction on speech." *Id.* at 868. While the CDA may well have chilled the free speech rights of adults, the Massachusetts Regulations unquestionably leave adults with ample alternative avenues for obtaining tobacco product information, are certain of definition and do not deter Petitioners from propagating their ads through other media and venues.[5]

In *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878 (2000), the Court struck down a federal statute that sought to protect children from indecent images that they might see on cable television from "signal bleed." The law required cable television operators to either fully scramble their sexually-oriented programs or broadcast them late at night. The majority opinion implicitly acknowledged that the government's interest in protecting children from seeing or hearing offensive material without parental consent constituted a compelling Government interest. 120 S. Ct. at 1885-1887.[6] It found the statute unconstitutional

---

[5] Justice O'Connor's partial concurrence is especially noteworthy here, as it reviews the states' ubiquitous use of zoning laws to create "adult zones," which deny minors access to harmful speech. *Id.* at 887-889 (O'Connor, J., concurring in part and dissenting in part). She observes that such laws are valid if they keep children away from speech that they have no right to obtain, without unduly restricting adults' right to the same speech. *Id.* at 888-889 (O'Connor, J., concurring in part and dissenting in part). By this standard, which is fully consistent with the majority opinion, the Regulations clearly pass First Amendment muster.

[6] Justice Breyer's dissenting opinion expressed concern that the majority opinion carried the opposite implication. *Id.* at 1901

because of the ready availability of a less restrictive alternative (blocking undesired channels by parental request) and the Government's failure to prove that the problem was pervasive and that the less restrictive alternative was inadequate. *Id.* at 1888-1892. Even at that, four members of this Court concluded that "the special need to protect children," *id.* at 1904 (Breyer, J., dissenting), along with serious questions regarding the effectiveness of these alternatives, *id.* at 1902-1903 (Breyer, J., dissenting), should have dictated a different result.

In contrast to the alternatives available to parents who wish to protect their children from signal bleed, there is no less restrictive means of blocking children's access to harmful solicitations to use tobacco. Parents cannot be expected to blindfold their children before sending them out to play or allowing them to enter a convenience store. What else was the Commonwealth supposed to do to protect children from exposure to outdoor and in-store tobacco advertising, after finding it was a pervasive problem in Massachusetts? (J.A. at 105-106.) The state did not prohibit all storefront billboards, only those near schools and playgrounds. The state did not eliminate in-store ads, it simply moved them away from children's eye level.

(Breyer, J., dissenting) (citing majority opinion at 1891-1892). Respectfully, this concern appears to be unwarranted. The majority simply opines that, where the Government has at its disposal a much less restrictive alternative that allows parents to block the offending speech, its "interest in *substituting itself* for informed and empowered parents . . . is not *sufficiently* compelling to justify this widespread restriction on speech." *Id.* at 1892 (emphasis added). This does not signal the Court's abandonment of the well-settled rule of giving special consideration to regulations aimed at protecting children from harmful speech.

Reno and *Playboy* reaffirm this Court's view that carefully drawn government measures to protect children from harmful speech are accorded greater latitude than similar measures imposed on the general population. The same state paternalism that it rightly criticizes when imposed on adults, *see, e.g., Virginia State Bd.*, 425 U.S. at 770, is a virtue when appropriately applied to children. The key consideration is whether the law at issue "unduly restrict[s] adults' access to constitutionally protected speech," *Reno*, 521 U.S. at 889 (O'Connor, J., concurring in part and dissenting in part) – which the Massachusetts Regulations plainly do not.

Carefully drawn state measures, aimed at protecting children from solicitations to use an addictive product that can kill them, are deserving of at least the same latitude as that given to measures that seek to shield children from indecent speech. In *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996), the Fourth Circuit Court of Appeals adopted that reasoning in upholding Baltimore's restrictions on outdoor sign alcohol advertising. It stated that its decision "conforms to the Supreme Court's repeated recognition that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media." *Id.* at 329.[7] The court supported its decision by citing to this Court's decisions on indecent speech. *Id.* at 329-30.

Like Baltimore's ordinance, the Massachusetts Regulations are not in violation of the First Amendment for the very same reason that an ordinance prohibiting outdoor signs

---

[7] The same rationale was summarily applied to Baltimore's restrictions on outdoor sign tobacco advertising. *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 101 F.3d 332 (4th Cir. 1996) (*Penn Advertising II*).

displaying full frontal nudity, or an ordinance limiting the display of pornographic magazines in stores to "adults only" sections, are constitutionally authorized. *See Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985). So long as adults can receive adult messages, children can be shielded from adult messages.

The argument for recognizing the authority of governments to protect children from uniquely dangerous messages is even more compelling when the regulation stands on a strong empirical footing. This Court's recognition that youngsters may suffer psychological harm when they view indecent images or hear indecent speech was based on common sense and experience; no proof was provided, nor was it needed, as the Court observed in *Ginsberg*, 390 U.S. at 641-642. In contrast, there is no shortage of proof that tobacco advertising plays a significant role in luring children into the trap of nicotine addiction. Both the FDA and the U.S. Surgeon General, after exhaustive study, have concluded that advertising plays a substantial role in influencing children to begin using tobacco. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed Reg. 44,396, 44,466 (1996)("FDA Regulations"); U.S. Dep't of Health & Human Servs., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* iii (1994)("1994 Surgeon General's Report"). These governmental findings are confirmed by overwhelming social science evidence proving the link between tobacco advertising and experimentation with, and then addiction to, tobacco products by minors. (J.A. at 104-125.)

Most of the victims of tobacco advertising are minors. The average age of smoking initiation is *fourteen*. 1994 Surgeon General's Report, at 41. Over 80% of all tobacco users

first began using tobacco before turning eighteen. *Tobacco Use Among High School Students–United States, 1997*, Morbidity & Mortality Wkly. Rep. (U.S. Dep't of Health & Human Servs., Apr. 3, 1998), at 229. Overall, 42.7% of high school students use some form of tobacco. *Id.* at 230.

Precisely because children "lack the ability to assess and analyze fully the information presented through commercial media," *Anheuser-Busch*, 101 F.3d at 329, they are more likely to fall prey to tobacco advertising messages than adults and begin experimenting with tobacco use before developing the intellect needed to fully appreciate the consequences of that decision. Seventy percent of smokers aged 12 to 17 say that they already regret their decision to smoke and 66% say they want to quit. FDA Regulations, *supra*, at 44,398. Thus, by the time young smokers reach adulthood, they are already bound by the garrote of nicotine addiction. "[A]n adolescent decision made as an 11- or 12-year old is going to result in a painful, premature and needless death for over five million of today's children . . . . They will, on average, die 12 years earlier." *News and Views From the Franklin County Prevention Institute*, Reuters, Nov. 14, 1996 (quoting Michael Ericksen, Director of the Office of Smoking and Health, Centers For Disease Control and Prevention).

Given both the breadth and the gravity of this public health menace, one that is literally a matter of life and death to millions of young people, and given that advertising plays a significant role in fostering the problem among children, this Court should extend its "special solicitude" for child-protection measures to the Massachusetts Regulations.

In their brief, Petitioners do not acknowledge this Court's extraordinary deference toward child-protection measures but attack it indirectly, (Pet'rs' Br. at 36-38),

portraying themselves, rather than their hapless adolescent customers, as victims. They claim that "virtually no public display of favorable images of tobacco will be permitted in Massachusetts," (Pet'rs' Br. at 36), and equate the Regulations with a "blanket ban." (Pet'rs' Br. at 38.) That is false. The industry has in fact retained broad alternative avenues of communication to convey their advertisements to adult consumers – not only storefront signs outside the forbidden zones, and in-store ads placed more than five feet above the ground, but also newspapers, magazines, direct mail, promotional clothing, the Internet, etc.

As the FTC recently revealed, the tobacco manufacturers have exploited such alternative avenues with a vengeance: Total advertising and promotional expenditures in the cigarette industry rose a remarkable 22.3 percent in 1999 alone. The $8.24 billion spent was "the most ever reported to the Commission." Federal Trade Commission, *Federal Trade Commission Cigarette Report for 1999* 2 (2001). The industry spent $51 million on newspaper ads, $377.4 million on magazine ads, $38.7 million on point-of-sale ads, $3.54 billion on promotional allowances to retailers, $33.7 million on free cigarette samples distributed to the public and $355.7 million on mail distribution and promotional events. *Id.* at 3-4. Clearly, the industry will have no trouble getting its message across to adult consumers in Massachusetts. *Compare 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (striking down statute that barred all advertising of alcohol prices except in-store ads, on grounds that it amounted to a "blanket ban" on commercial speech).

Finally, Petitioners' reliance on *Carey v. Population Services International*, 431 U.S. 678 (1977), is actually supportive of the Regulations, for it precisely illustrates what the case at bar is not about. (Pet'rs' Br. at 36-37.) *Carey*

concerned a complete ban on all advertising of contraceptives in the State of New York, *id.* at 681; the Massachusetts Regulations merely restrict the advertising of tobacco products to particular media and locations. In *Carey*, the Court rejected as unsubstantiated the government's argument that restrictions on contraceptive ads were needed to protect children from unwholesome influences, *id.* at 694-698, 701; in the instant case, Massachusetts has provided a wealth of data showing that tobacco advertising poses a grave threat to children's health. (J.A. at 102-127.) In *Carey,* the ads promoted products and services that enjoy constitutional protection for their sale, *id.* at 701; tobacco ads, far from enjoying such added constitutional protection, promote a deadly product that governments have every right to ban altogether. *Austin v. Tennessee*, 179 U.S. 343 (1900).

In *Carey*, the State of New York attacked contraceptive advertising on the ground that it might be offensive and embarrassing and might legitimize illicit sexual activity among young people. 431 U.S. at 701. This Court, in a footnote, viewed such arguments as attacking the ideas conveyed in the ads, rather than addressing any commercial aspect. *Id.* at 701 n. 28. Seizing on that footnote, Petitioners argue that the Regulations, too, are an attack on their ideas, rather than on the commercial aspect of their ads. (Pet'rs' Br. at 37).

However, the only idea being suppressed by Massachusetts is the idea that tobacco is a desirable product children should use. There are no constitutionally sacrosanct messages intermingled with the sales pitch and no constitutional rights implicated beyond the First Amendment rights at issue.

Thus, unlike the sweeping prohibition at issue in *Carey*, the Commonwealth's Regulations are truly deserving of this

Court's special solicitude for measures that protect children from distinctly harmful speech.

B. The Regulations pass First Amendment scrutiny for the additional reason that they target speech disseminated by intrusive media, which impose harmful messages on children in a manner that cannot be avoided.

If governments possess considerable authority to protect children from patently harmful speech, they possess still greater authority to protect children from such speech when it is disseminated by intrusive media. This Court has long recognized the government's authority to protect the right of all people, young and old alike, to go about their lives without having speech involuntarily imposed on them.

In *Packer Corp. v. Utah*, 285 U.S. 105 (1932), the Court upheld Utah's ban on all outdoor tobacco sign and point-of-purchase advertising, largely on the ground that the law was aimed at protecting minors. *Id.* at 108-110. The Court also emphasized that, while most advertising "is ordinarily seen as a matter of choice on the part of the observer," "[b]illboards, street car signs, and placards and such are in a class by themselves. . . . to be seen without the exercise of choice or volition on their part." *Id.* at 110 (citation omitted).

Although *Packer* was not a First Amendment case, the Court has subsequently applied this distinction between intrusive or "captive audience" speech, and speech that the recipient chooses to receive, in upholding government restrictions on speech against First Amendment challenges. In *Kovacs v. Cooper*, it upheld an ordinance prohibiting the use of sound trucks, on the grounds that people cannot escape messages propagated by such means. 336 U.S. 77, 86-87

(1949). In *Lehman v. City of Shaker Heights*, the Court upheld a city's refusal to sell advertising space on mass transit vehicles to candidates for public office, largely because "[t]he streetcar audience is a captive audience." 418 U.S. 298, 302 (1974) (plurality opinion); *id.* at 306-307 (Douglas, J., concurring) (emphasizing captive audience rationale). *Accord Breard v. Alexandria*, 341 U.S. 622, 644 (1951) (upholding municipality's authority to ban door-to-door canvassing); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736-737 (1970) (upholding federal statute requiring direct mail advertisers of sexually provocative material to remove persons from mailing list at the request of the addressee).

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court upheld the FCC's authority to sanction a radio station that broadcast offensive language at a time when children were undoubtedly in the audience. A vital part of the Court's rationale was the "uniquely pervasive presence" of the broadcast media and the fact that listeners cannot avoid the indecent speech, at least not until they have already been subjected to a dose of it. *Id.* at 748-749.

The government's considerable authority to protect children from speech that is both harmful and intrusive was recently reaffirmed by this Court in *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), where it held that "the need to protect children from exposure to patently offensive sex-related material" amply justified a federal statute allowing cable TV systems to ban such indecent programs over leased access channels. 518 U.S. at 743 (Breyer, J., plurality). The Court upheld the law – even though it inconvenienced adults who would therefore have to rent videotapes in order to view such material – largely because such programming can be seen by children "generally

without sufficient prior warning to allow the recipient to avert his or her eyes or ears." *Id.* at 744.

Petitioners fail to explain how children can avert their eyes from convenience store billboards when they walk to school or can fail to notice point-of-purchase cigarette displays that cover shops like wallpaper.

Conclusion

The Massachusetts Regulations are fairly balanced to protect children from harmful solicitations to use tobacco, while preserving the right of adult consumers to receive tobacco advertising. Accordingly, Amici respectfully request that this Court affirm the judgment of the Court of Appeals.

Respectfully Submitted,

Donald W. Garner
Counsel of Record
Professor of Law
Lesar Law Building
Southern Illinois University
Carbondale, IL 62901-6804
(618) 453-8718

Richard J. Whitney
Speir & Whitney
3200 Fishback Road
Carbondale, IL 62901
(618) 549-5159

George A. Hacker
Director, Alcohol Policies Project
Center for Science in the Public Interest
1875 Connecticut Avenue, N.W., Suite 300
Washington, D.C. 20009
(202) 332-9110, ext. 343

Counsel for Amici Curiae

APPENDIX A

DESCRIPTION OF INDIVIDUAL AMICI CURIAE

Amicus American Medical Association (AMA), with a membership of more than 280,000 physicians, is the largest private nonprofit organization of physicians in the United States. The AMA's mission is to promote the science and art of medicine and the betterment of the public health. The AMA has long opposed tobacco use based on the massive body of scientific evidence that tobacco is addictive and kills smokers. The AMA appears as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition of the AMA and 50 state medical societies, organized to represent the interests of organized medicine in the courts.

Amicus American Heart Association is a not-for-profit health organization whose mission is to reduce disability and death from cardiovascular disease and stroke.

Amicus American Lung Association is a voluntary health organization whose mission is to prevent lung disease and promote lung health through public education, research and advocacy.

Amicus American Cancer Society (ACS) is a nonprofit public health organization with a membership of over 2.3 million volunteers throughout the country, including over 50,000 physicians. ACS is committed to the goal of controlling and eliminating cancer through research, education, advocacy and service. Research conducted and supported by ACS since

the1950s has played a pivotal role in identifying the use of tobacco products as a major cause of cancer. The ACS joins this brief on behalf of the National Home Office of the American Cancer Society and its New England Division.

Amicus Center for Science in the Public Interest advocates public health policies to reduce alcohol problems and has led efforts to restrict youth-oriented advertising of alcoholic beverages.

Amicus Massachusetts Medical Society, founded in 1781, is the oldest continuously operating medical association in America, with more than 17,000 physician and student members. Its chartered purpose is "to do all things as may be necessary and appropriate to advance medical knowledge, to develop and maintain the highest professional and ethical standards of medical practice and health care, and to promote medical institutions formed on liberal principles for the health, benefit and welfare of the citizens of the commonwealth." The Society, in the interest of patients and public health, has actively supported efforts to regulate tobacco.